Alldata Corporation and Karl Abbadessa. Case 29–CA–19772

November 18, 1998 SUPPLEMENTAL DECISION AND ORDER BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The issue in this case¹ is whether the judge correctly found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Karl Abbadessa because he engaged in the protected concerted activity of complaining, along with his fellow salesmen, to the Respondent's management about compensation and other working conditions. The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

The General Counsel in order to establish an unlawful discharge must establish that the discharge was motivated by unlawful reasons. Contrary to our dissenting colleague, we agree with the judge that the General Counsel, based on the totality of the circumstances, satisfied his burden of demonstrating unlawful motivation. See Fluor Daniel, Inc., 311 NLRB 498 (1993), enf. granted in part, remanded 102 F.3d 818 (6th Cir. 1996); and Associacion Hospital del Maestro, 291 NLRB 198, 204 (1988). As stated in Power Systems Analysis, 322 NLRB 511, 514 (1996): "Inferences of [both] animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence." See Fluor Daniel, supra at 498 ("The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be based on the Board's review of the record as a whole."); and New Breed Leasing Corp. v. NLRB, 111 F.3d 1460, 1465 (9th Cir. 1997) ("The Board may base its inferences on either circumstantial or direct evidence."). Thus, our dissenting colleague's suggestion that we are somehow dispensing with the motivational element of 8(a)(1) discrimination is in error, and his assertion that "the animus itself must be shown by evidence rather than by inference" is directly contrary to controlling Board precedent. See also Sherwin-Williams Co., 313 NLRB 163 fn. 5 (1993) ("We recognize that the General Counsel may have failed to present independent evidence of antiunion animus. However, the ultimate issue to be decided is whether the discharge was motivated by union activity. To be sure, where there is independent evidence of union animus, such evidence can be an element of a showing that a discharge was based on union activity. But such evidence in not a sine qua non for establishing the violation. Rather, we look to all of the circumstances of a case to determine whether a discharge was unlawfully motivated."). Specifically, we find

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Alldata Corporation, New York, New York, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Discharging or otherwise discriminating against any employees for engaging in protected and concerted activity for their mutual aid or protection.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Karl Abbadessa full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make Abbadessa whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Abbadessa in writing that this has been done and that the discharge will note be used against him in any way.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region

¹ On December 27, 1996, Administrative Law Judge Raymond P. Green issued a decision recommending dismissal of the complaint based on his finding that the underlying charge had not been filed within the 6-month limitations period of Sec. 10(b). The Board reversed his dismissal and remanded the case for further findings and conclusions regarding the allegation that the Respondent's discharge of the Charging Party violated Sec. 8(a)(1) of the Act. *Alldata Corp.*, 324 NLRB 544 (1997). November 12, 1997, the administrative law judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

that such unlawful motivation is indicated by: the timing of the discharge in that it occurred shortly after Abbadessa's voicing of employee complaints about the Respondent's bonus policy, expense reimbursement, sales support and other issues; the disparity in the Respondent's treatment of Abbadessa and other underperforming sales people; and the inconsistency between commending and rewarding Abbadessa for his sales performance and then shortly thereafter firing him for alleged poor performance. Unlike our colleague, we find that these circumstances do demonstrate that Abbadessa was discharged because of his protected activity.

³ We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997). We shall also substitute a new notice that conforms to the Order.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting.

I do not agree that the General Counsel has established a prima facie case that protected activities were a motive for the discharge of Karl Abbadessa. In my view, there is a total absence of evidence of employer animus against protected concerted activities.

I agree that Abbadessa engaged in protected concerted activities, and I agree that the Respondent had knowledge thereof. However, the ultimate question is whether such activities motivated the discharge. I do not think that such motive can be found unless it can be shown that the Respondent had animus against such activities, i.e., that it harbored a hostile attitude toward such activities. Concededly, such hostility can be shown by indirect evidence. However, in the instant case, there is no evidence (direct or indirect) of such hostility. And, to say that the hostility flows from an unlawfully motivated discharge is to put the cart before the horse. Accordingly, I would dismiss the complaint because of a failure to establish a prima facie case.

My colleagues point to "circumstances" which, in their view, can be relied on in lieu of animus. I disagree. As noted above, in order to establish that a discharge is motivated by animus toward protected activity, it would seem that, at a minimum, the General Counsel would have to establish that the Respondent bore animus toward such activity. I agree that one can infer, from circumstantial evidence, that a given discharge was motivated by animus, i.e., hostility. But, I believe that the animus itself must be shown by evidence rather than by inference. To hold otherwise is to pile inference on top of inference. My colleagues say that animus against pro-

tected activity is not a critical element of a Section 8(a)(1) discharge. Thus, their view is that an employer can be shown to have discharged an employee in reprisal for protected activity, even though it is not shown that the employer is hostile to protected activity. That reasoning is contrary to the motivational essence of a Section 8(a)(1) discrimination case.

Further, even assuming arguendo that "circumstances" can supplant animus as an element of proof, I would not find such "circumstances" here. In this regard, my colleagues point to timing as an element of the General Counsel's case. However, Abbadessa's protected activity occurred in May 1995. The Respondent nonetheless sent Abbadessa a congratulatory letter, and awarded him stock options, on June 20. If the Respondent was angry with Abbadessa because of his protected activity, one wonders why, on the heels of such activity, it treated him favorably. Thus, the element of timing does not support a case for discrimination.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in concerted activity for mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Karl Abbadessa full reinstatement to his

former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Abbadessa whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Abbadessa, and WE WILL,

¹ See Wright Line. 251 NLRB 1083, 1090 (1980).

² Typically, that hostility toward protected concerted activities is established by 8(a)(1) statements. Under the language of Sec. 8(c), it cannot be shown by mere expression of opinion

within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ALLDATA CORPORATION

Marcia Adams, Esq., for the General Counsel. Robert L. Rediger, Esq., for the Respondent. Thomas J. Gagliardo, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me on September 11 and October 18, 1996. On December 27, 1996, I issued a Decision and Order dismissing the complaint on the ground that a valid charge was not filed within the 6-month statute of limitations period. I also concluded, based on the record as a whole, that if a valid charge had been timely filed, I would have found that the Respondent violated Section 8(a)(1) of the Act by discharging Karl Abbadessa on June 23, 1995, because of his protected and concerted activity of presenting employee grievances to management. (In particular a letter dated May 23, 1995, wherein he wrote about salaries, commissions, and other terms and conditions of employment and which indicates, on its face, that he was speaking about the concerns not merely of himself, but of other salesmen as well.)

On September 30, 1997, the Board held that a valid charge had been filed within the 10(b) period and remanded this matter to me for further findings and conclusions regarding the discrimination allegation.

Based on the record as a whole including my observation of the demeanor of the witnesses I made the following findings and conclusions.

Abbadessa was hired as a salesman in May 1993 and he worked in the New York City area under the supervision of Arnold Pincus, the field sales manager. This region had about seven or eight salesman. Abbadessa's earnings were largely determined by commissions from sales. In this regard, the Company modified the commission formula from time to time and this affected the earnings of the salesmen.

In August 1994, Pincus fired Abbadessa because of an alleged impropriety reported by a customer regarding certain payments for training. This decision was canceled however, and Abbadessa received a written warning instead. This warning, among other things, stated that "you must maintain your direct selling quota requirements to continue your employment." (This statement in the letter did not have anything to do with the incident leading to the discipline.)

There is no dispute that the Company has a policy whereby salesmen are required to meet a quota of 7-1/2 sales per rolling calendar quarter. This means that the sales record of any salesman is reviewed at the end of every month and he or she is theoretically required to have met the quota for the preceding 3 months. (The quota includes direct sales and sales made by snap-on tools within a sales person's territory.) The evidence shows that while this was a stated policy, the failure to meet the rolling quarter, did not in the past, usually result in an automatic or peremptory discharge. Indeed, Abbadessa, despite missing quotas during 1995, nevertheless succeeded, during that calendar year, in having more sales than most of the Company's other sales personnel. Also, General Counsel's Exhibit 9a (1-69) shows that in 1994, the typical response by the Com-

pany to a sales person's failure to meet the rolling quarter quota, was a warning often accompanied by an improvement plan.

On April 11, 1995, Abbadessa was notified by Carl F. Raine, executive vice president, that he had qualified for the 1995 Winner's Circle to be held May 17–21, 1995, at the Westin Mission Hills Resort in Rancho Mirage. Thus, despite his tendency to obtain sales in spurts, Abbadessa ranked in the top 10 percent of the sales force for the preceding year.

In anticipation of his trip to the Winner's Circle, Abbadessa talked to other sales people in his region about their conditions, principally about what he perceived to be the constant changes in the commission formula.

On May 10,1995, Pincus sent an e-mail to Robert Weiffenbach, vice president of sales, recommending either Michael Hill or Bob Kovach for promotion. On May 11, 1995, Weiffenbach responded that he thought that Abbadessa was probably a better candidate. On May 12, 1995, Pincus sent an e-mail stating:

Karl Abbadessa is a better candidate than Michael Hill. However, I did not choose him because he has a poor reputation with snap on. I feel this will negatively affect their cooperation with us helping us get prospects to attend. I have attempted and am continuing efforts to bring upon an improvement in their relationship. Karl has been resisting making peace.

On arrivial at the Westin Hotel, Abbadessa talked to other sales people about his complaints. He testified that on one of the days during the week, he spoke to Weiffenbach, and told him that there was dissatisfaction among the sales employees. Abbadessa testified that he asked for a meeting whereby he and the other sales people could talk to the Company's president, Rod Georgiu. At this meeting, Abbadessa complained about a number of issues including the company's policies on bonuses, on job-related expenses and reimbursement, and on telemarketing support. According to Abbadessa, at the end of the meeting, Georgiu appeared to by [sic] sympathetic and suggested that the complaints be put in writing.

According to Abbadessa, he received a phone call from Weiffenbach on May 22, asking that he send the letter to Georgiu as soon as possible. Abbadessa drafted a letter and discussed its contents with his manager, Pincus. Indeed, Pincus testified that he reviewed the letter and suggested that Abbadessa tone it down.¹

On May 23, Abbadessa sent the revised letter, which is appended to the original decision in this case as Appendix A.

On June 5, 1995, Weiffenbach sent an e-mail to all field service managers, including Pincus. This stated:

In the next day or two I will be sending you a list of reps that need to be terminated immediately. Basically the list will include established reps that are below 2 or 3 units YTD. Each of you has a rep or two in this category and this performance can not be allowed to continue this year. There is absolutely no excuse for an established rep not to be above quota. Below is a recap of the performances.

YTD Units/two months.

39 Reps at quota

13 between 4-5

 $^{^{\}rm I}$ I note that Pincus was out with an illness from December 1994 to April 1995.

14 between 3-4

23 between 2-3

16 between 1-2

20 less than 1 (inc. new hires)

Weiffenbach did not follow up the June 5 e-mail with a list of discharges and on June 13, Pincus sent a message to Weiffenbach as follows:

At this time several sales reps don't qualify for retention. Alan Tankoos has two units ytd. (Including a five year 4xx just approved) Karl Abbadessa has two units ytd. (If his business doesn't improve he may be my first choice to go.)

In the meantime, an exchange of e-mail messages occurred between Abbadessa and Weiffenbach commencing on June 10, 1995. The first message is from Abbadessa to Weiffenbach and although I do not completely understand its contents, it seems to have some relationship to the Company's use of snap on tools as a sales representative. This generated a hostile response by Weiffenbach who stated, inter alia,

Karl, you need to put our adversarial attitude about snap on in the closet and leave it there. They do not work for you or I and your heavy handed tactics will only serve to further damage the relation. You can be certain I will not allow that to happen. I am working hard to get their entire organization behind us. Your role in this plan is to nurture the relation and sell Alldata to every shop in your territory. I design the rules; you implement them.

On June 20, Abbadessa responded by stating, inter alia,

Regarding any adversarial approach to the relationship, while I may be guilty of voicing my opinion internally, be assured that it is not how I have approached attempts to build the relationship. As there have been misunderstandings of things discussed with the dealers, I am a little gun shy and cautious. That is what prompted my suggestion—a desire to have all points clear to all the players, laid out in a way they could be referred to with no misunderstandings. My intent was not to be heavy handed. I am committed to getting the most out of this relationship as possible.

At almost the same time that Abbadessa sent the foregoing e-mail to Weiffenbach, the latter, sent Abbadessa a letter dated June 20, 1995, which stated:

Congratulations on your sales success during the 1994/1995 sales year. As a member of this year's Winner's Circle you have earned 600 stock option shares. These stock options have been approved by the Board of Directors and enclosed are the following

Notwithstanding the June 20 congratulations, Abbadessa was sent a letter on June 23, 1995, informing him that he was being discharged. This letter stated:

As you know the minimum acceptable level of business sales quota has been established at 2.5 sales per month or 7.5 per rolling quarter. Your sales from April 1, through June 23, 1995 has been 1 direct unit and 2 indirect, for a total of 3. In addition you have one cancellation . . . and a possible 2nd cancellation This would leave you with 2 and possible 1 net sale for the rolling quarter. Because you did not meet your minimum sales requirements, ALLDATA Corporation has no alternative but to

terminate your employment immediately, effective June 23, 1995.

An internal company memorandum regarding the discharge of Abbadessa states that his last day of employment was June 23, 1995. It further states that the reason for the discharge was his "failure to maintain sales volume." There is nothing in this memorandum, or in the letter to Abbadessa dated June 23, which indicates that there were any otherconsiderations for his discharge.

Abbadessa credibly testified that prior to receiving the June 23, 1995, he did not receive any warnings specifically regarding his failure to meet the sales quota. There is nothing in his personal file to indicate that such a warning was ever given and to this extent I do not credit the testimony of Pincus who asserted that he "pleaded" with Abbadessa to get his sales up.

It is more probable than not that Abbadessa would not have meet the quota for the rolling quarter ending June 30, 1995. Nevertheless, the fact is that the decision to discharge him was made before the month was over and another employee in the same region (Tankoos) did not meet the quota and was not discharged at that time.

Respondent's Exhibit 8 is a September 1995 memorandum from Weiffenbach to the field managers and it states, inter alia,

On September 10th 1995, I assembled a group of ALLDATA FSMs in Elk Grove to assist me in the final steps of our recent "trimming." I use the work trimming because that is exactly what it was.

First, let me state that ALLDATA is not in any financial difficulties. And it is not at risk of going out of business. Our finances are strong and we are now starting to realize the expected benefits from recurring revenue. Revenue that has been made possible by the efforts of may [sic] hard working, dedicated field sales personnel, telemarketers and tele-sellers.

Second, this was not a wholesale reduction of my team. For too long, ALLDATA has been tolerant of non-productive reps. And this negatively affects our entire organization's ability to grow . . . and equitably compensate those deserving.

How negative? consider the expense involved in "supporting" 30-40 non revenue generating sales reps every month

I am sure you are aware that if the output is greater than or equal to the intake adjustments must [be] made. And they were.

The adjustments were made for very fundamental reasons. The benefits to ALLDATA and you:

- 1. Reduced overhead with a minimal impact on total unit volume.
- 2. Increased focus by the FSMs on helping our top people do even better.
- 3. Freeing up additional funds to explore new and other projects to keep ALLDATA the leader in the industry.
- 4. Allocation of more funds to pay better commissions to *producers*.

There are many more sideline benefits to this "trimming," however these are the most important.

. . . .

ALLDATA wants top level hard working sales reps and is willing to pay them well for their results. And we will no longer support non-productive people.

This memorandum obviously refers to the fact that *commencing* on September 11, 1995, and continuing through September, October, November, and December 1995, the Company discharged 44 sales people throughout the country. This seems to me to be connected to Weiffenbach's June 5 letter where he stated that he soon would be sending to the sales managers, lists of people to be terminated. What seems to have taken place is that in or before June 1995, the Company decided to trim its sales force of those people who did not meet the quota and, according to Respondent's Exhibit 8, effectuated that decision on September 10, 1995. This resulted in the first batch of discharge letters going out on September 11 and 12, with subsequent letters following thereafter.

What I infer from the above, is that in the spring or summer of 1995, the Company decided to get tough regarding its quota policy but did not actually carry this out by discharging people until September 1995, *almost months after Abbadessa was fired*. If Abbadessa had been treated like all of the other sales people who were below quota, he would *not* have been discharged in June 1995 and he might have reached the quota during the rolling quarters ending in August and September 1995

In my opinion, Abbadessa engaged in protected concerted activity when he, along with other employees, raised complaints about working conditions during the meeting with Georgiu at the Winner's Circle meeting held in May 1995. It is also my opinion that the letter that he wrote on May 23, 1995, which refers to the collective "we" and which raises a number of complaints regarding wages and working conditions, constituted, and was perceived by the Company, as being concerted activity. *Arthur Young & Co.*, 291 NLRB 39, 43 (1988); and *Oakes Machine Corp.*, 288 NLRB 456 (1988).

It seems to me that the General Counsel has made out a primae facie showing that the Respondent was motivated, at least in part, by Abbadessa's complaints about wages and working conditions that were expressed at the meetings in May and via his letter of May 23, 1995.² As such, and under *Wright Line*,

251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the burden shifts to the Respondent to show that it would have discharged Abbadessa for legitimate reasons other than his protected concerted activity.

In my opinion, the Respondent has not met its burden. Although it has shown that Abbadessa, as of June 23, 1995, probably would not have met the rolling quarterly quota, the evidence suggests that at least up to that point in time, discharge for this type of "offense" was not typical and was preceded by written warnings. If anything, the evidence suggests that at most, the Company had decided to get tough, was in the process of preparing lists of people to be discharged for low production and finalized that decision, not in June 1995, but in September 1995. Thus, as I see this case, if Abbadessa had been treated like all of the other sales people who were below quota, he would not have been discharged until September 11 at the earliest, and then only if by that time he was still under quota.

CONCLUSIONS OF LAW

- 1. By discharging Karl Abbadessa because of his protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act.
- 2. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

on tools also are related to commission rates, these too would encompass and be tied into terms and conditions of employment.

² It seems possible to me that a related reason for discharging Abbadessa was the Company's reaction to Abbadessa's carping about the relationship with snap-on tools. But as his complaints regarding snap-